GAN KOO KEA

v.

GAN SHIOW LIH

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: MT-1-24-110-2003]
7 OCTOBER 2003

FAMILY LAW: *Children - Guardianship - Whether joint-guardianship should be given to both parents or mother alone - Considerations - Children staying with mother continuously since parents' separation - Ages of children - Caning of children by father using a clothes hanger - Failure of father to attend to children after separation - Whether suitable for father to have guardianship*

FAMILY LAW: *Children - Custody - Considerations - Welfare of the child - Law Reform (Marriage and Divorce) Act 1976, s. 88(2) - Meaning of 'welfare' - Whether mother able to provide children with love and affection and adequate home-environment - Presumption in favour of mothers and undesirability of disturbing life of child by changes of custody - Section 88(3)*

FAMILY LAW: *Children - Access - Right of access for parent deprived of custody - Law Reform (Marriage and Divorce) Act 1976, s. 89(2)(d) - Role of father*

EVIDENCE: *Affidavit - Conflicting versions - Proceedings for custody of child under Law Reform (Marriage and Divorce) Act 1976 - Absence of viva voce evidence - No cross-examination and re-examination - Whether court must disregard disputed facts - Whether must decide case solely on undisputed facts*

WORDS & PHRASES: *"welfare" - Law Reform (Marriage and Divorce) Act 1976 - Section 88(2) - Meaning of welfare of the child*

This was an application by the plaintiff/husband for the guardianship, custody, care and control of his two sons, aged four and five respectively, born out of his marriage with the defendant/wife. In the alternative, the plaintiff prayed for liberal access in the following terms: (i) weekly, overnight stays in the plaintiff's house, from Friday 6pm to Sunday 6pm; (ii) half of the school holidays when the children attain school-going age; (iii) every Chinese New Year, from 6pm of the eve to 6pm of the second day thereof; and (iv) every other public holiday, from 10am to 6pm thereof.

The parties were married in 1996, and when they separated in 2001 the children stayed with the defendant and were cared for by the defendant's mother. In 2003, an interim consent order was recorded whereby the plaintiff would pay RM900 per month towards the maintenance of the children. The plaintiff was also given access to the children every Sunday from 10am to 2pm in the defendant's house.

It was submitted for the plaintiff that he should not, as a father, be deprived of his right to the guardianship of his children, and that both the plaintiff and the defendant should be given joint-guardianship. In respect of custody, care and control, it was submitted that the presumption in favour of mothers under s. 88(3) of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') had been rebutted – owing to the 'unhealthy and abnormal attitude' of the defendant.

On the other hand, the defendant submitted that the guardianship of her children should be given to her alone as the plaintiff was 'not a responsible person or a good role model'. In respect of custody, care and control the defendant relied on s. 88(2) and (3) of the LRA.

Held:

[1] The affidavits filed by the opposing parties contained seriously conflicting allegations of fact. Bereft of the benefit of cross-examination and re-examination in these proceedings, the court had to disregard the disputed facts and decide the case based solely on the undisputed facts. (p 544 f-h)

[2] The guardianship of the children should be given to the defendant for the following reasons: (i) the children had been staying with the defendant continuously ever since her separation from the plaintiff; (ii) the tender ages of the children; (iii) the caning of the children by the plaintiff using a clothes hanger; and (iv) the failure of the plaintiff to attend to the children after the separation. It would, in these circumstances, be unsuitable for the plaintiff to have guardianship of the children. (p 545 d)

[3] In proceedings for the custody of a child, the paramount consideration is the welfare of the child as espoused by s. 88(2) of the LRA. Although 'welfare' is not to be equated with material advantage, the ability to provide an adequate home-environment is a determining factor. In the instant case, there was nothing in the undisputed facts that indicated that the defendant would be unable to provide the children with love and affection or with an adequate home-environment. The presumption in favour of mothers as well as the undesirability of disturbing the life of a child by changes of

custody – as envisaged by s. 88(3) of the LRA – would also apply and operate to the advantage of the defendant. Consequently, the custody, care and control of the children should be given to their mother the defendant. (pp 546 g, 548 a, g & 549 c, e-g)

[4] Consistent with s. 89(2)(d) of the LRA, the plaintiff's alternative prayer for liberal access should be allowed. The defendant and her family members must give every facility, convenience and co-operation to the plaintiff to make the liberal access a reality. (p 550 g)

[Guardianship, custody, care and control of children given to defendant; liberal access to plaintiff.]

Case(s) referred to:
Allen v. Allen [1948] 2 All ER 413 ***(refd)***
Austin v. Austin [1865] 35 Beav 259 ***(foll)***
B Ravandran Balan v. Maliga Mani Pillai [1996] 2 MLJ 150 HC ***(refd)***
Chan Bee Yen v. Yap Chee Kong [1989] 1 MLJ 370 ***(refd)***
Helen Ho Quee Neo v. Lim Pui Heng [1974] 2 MLJ 51 ***(refd)***
J v. C [1970] AC 668 ***(refd)***
K Shanta Kumari v. Vijayan [1986] 2 MLJ 216 ***(refd)***
Kades v. Kades [1961] 35 ALJR 251 ***(refd)***
Kho Ah Soon v. Duniaga Sdn Bhd [1996] 2 CLJ 218 SC ***(refd)***
Loh Koh Fah v. Lee Moy Lan [1976] 2 MLJ 88 ***(refd)***
Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189 ***(refd)***
Re F [1969] 2 Ch 238 ***(refd)***
Re H (Minors (Access) [1992] 1 FLR 148 ***(refd)***
Re KO (an infant) [1990] 1 MLJ 494 HC ***(refd)***
Re M (Contact: Supervision) [1998] 1 FLR 727 ***(refd)***
Re Orr [1973] 2 DLR 77 ***(refd)***
Re Satpal Singh, (an infant) [1958] MLJ 283 ***(refd)***
Re Story [1916] 2 IR 328 ***(refd)***
Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(foll)***
Teh Wng Kim v. Yew Peng Siong [1977] 1 MLJ 234 HC ***(refd)***
Thavamani Deve Govindasamy v. N Sugumaran Neelmehan & Anor [1996] 4 MLJ 195 HC ***(refd)***
The Queen v. Gnygall [1893] 2 QB 232 ***(refd)***
W v. W and C [1968] 2 All ER 408 ***(dist)***

Legislation referred to:
Civil Law Act 1956, ss. 27, 88(1), (2)(b), (3), (4)
Guardianship of Infants Act 1961, s. 5(1), (2)
Law Reform (Marriage and Divorce) Act 1976, s. 89(2)(d)

Other source(s) referred to:
SM Cretney, *Principles of Family Law*, 3rd edn, 1979

For the plaintiff - Chew Swee Yoke; M/s SY Chew & Co
For the defendant - Betty Chew Gek Cheng; M/s Betty Chew & Co

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

Applications

Before me are two enclosures, *viz* (1) and (5) filed by the plaintiff husband ("the husband") for guardianship, custody, care and control of the two sons of the marriage, named KH aged 5+ and KW aged 4+ ("the children"); or alternatively liberal access as follows:

(a) weekly, for overnight stay, from Friday 6pm to Sunday 6pm with the husband fetching the children and returning them to the house of the defendant wife ("the wife") before and after the access;

(b) half of the school holidays when the children subsequently attain their school-going age respectively;

(c) every Chinese New Year season, from 5pm on the eve thereof to 6pm on the second day thereof; and

(d) every other public holiday from 10am to 6pm thereof commencing from the date of the order herein.

Facts Of The Case

The parties were married on 17 March 1996 and were blessed with the children, on 22 November 1997 and 27 February 1999 respectively. They stayed in a rented house at No. 34, Jalan Murni 8, Taman Mas Merah, Melaka. However, when the parties separated on 21 December 2001, the children were living with the wife in Melaka at all material times, while the husband lived alone in an apartment, also in Melaka.

An interim consent order was recorded on 10 April 2003, whereby the husband was given access every Sunday in the wife's house from 10am to 2pm in the presence of the wife's father but not anyone else. The husband has pursuant to the interim consent order paid RM900 per month towards the maintenance of the children, but has now stopped.

Both the children are below seven years of age and have at all times since childbirth been taken care of by the wife's mother when both the husband and the wife were at work in the same factory ie, Kao Denko (M) Bhd. in Batu Berendam, Melaka, but in different departments, as the husband is a sales manager while the wife is a clerk.

There have been several occasions of admitted beating of the children by the husband by using clothes hangers.

The elder child KH is now attending a kindergarten near the wife's house and has been registered with a national type primary Chinese school nearby while the younger child KW is still under the care of the wife's mother.

There are also other allegations of facts which are sharply conflicting.

Submission For Husband

Miss Chew Swee Yoke, learned counsel for the husband, submitted that the husband as father should not be deprived of his right to guardianship and that joint guardianship should be given to both the husband and the wife.

On the issue of custody, care and control, the stand taken for the husband is that the presumption in favour of the mother under s. 88(3) of the Law Reform (Marriage and Divorce) Act 1976 has been rebutted by, *inter alia*, the allegedly unhealthy and abnormal attitude of the wife. It was argued that financial ability is not a criterion for consideration in custody rights.

For ease of reference, unless the context otherwise requires, a reference to a section in this judgment is a reference to that section in the Law Reform (Marriage and Divorce) Act 1976.

She added that the court cannot order the husband to pay more than what he has agreed to in the interim consent order for maintenance ie, RM900 per month.

On the welfare principle, it was submitted that the children at their present age are too young to express an independent opinion, and that the husband's home environment would provide a better and healthier upbringing of the children in the context of a Chinese family.

It was also contended for the husband that the court should change the *status quo* in the interest of the children's welfare, and that under s. 27 of the Civil Law Act 1956, the court is obliged to have regard to the religion and customs of the parties in all cases relating to custody and control of the children, and also the children's long term advantage, at least in terms of liberal access. The court was urged to consider the attitude and conduct of both parties.

Where conflicting affidavits are concerned, it was argued that the court should ignore disputed facts and decide on undisputed facts.

Response By Wife

In respect of guardianship, Cik Betty Chew Gek Cheng, learned counsel for the wife, submitted that the husband is not a responsible person nor a good role model to the children and that the husband would send the children to a strange place in Kluang in the care of the husband's father and stepmother with no regard for the children's feelings.

She added that the husband has injected fear into the children by beating them with clothes hangers and that problems would arise in the upbringing of the children as there was no communication between the husband and the wife.

Further it was contended that the husband was petty and had always accused the wife of inability to, *inter alia*, look after the children, while the wife's stand is that the wife has an open mind and is able to communicate with the children to ensure and promote their interest and welfare. She argued that various problems would arise from joint guardianship.

On the issue of custody, care and control, the wife relies on the presumption under s. 88(2) and (3) and the welfare of the children.

It was also submitted for the wife that the children should not be deprived of the wife's love as a mother who is in a better position to provide a more suitable and beneficial environment to the children, and that any change thereof would have a negative effect on the children.

The wife contended that the husband would have easier access if the wife is given custody, care and control of the children, as all the parties are in Melaka.

Decision Of The Court

Conflicting Affidavits

Apart from the undisputed facts narrated above, it is to be observed that the numerous affidavits filed by the parties herein contain serious conflicting versions.

In the face of such conflicting versions with credible denials, but which do not enjoy the advantage of undergoing the acid test of cross-examination and re-examination, as would have been possible in the case of *viva voce* evidence in a full trial, my duty, as has been submitted for the plaintiff, is to ignore the disputed facts and decide on undisputed facts. This important point of practice in civil litigation has been succinctly stated by Lord Templeman for the Privy Council in *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 CLJ 441; ([1987] CLJ (Rep) 24) at pp. 444-445 (p. 28), in the following words:

> At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

The above Privy Council advice was followed by our Federal Court in *Kho Ah Soon v. Duniaga Sdn Bhd* [1996] 2 CLJ 218 through the judgment of Peh Swee Chin FCJ (as he then was).

In the circumstances, my judgment shall be confined only to the consideration of undisputed facts affirmed in the affidavits filed herein.

Guardianship

It is a common ground of the parties herein that s. 5 of the Guardianship of Infants Act 1961 has been amended *vide* PU(B) 376/99 with effect from 1 October 1999 to read, where relevant as follows:

> **Equality of parental rights**
>
> 5 (1) In relation to the custody or upbringing of an infant ..., a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.
>
> (2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

On the basis of the undisputed facts, in particular, the children's continuous stay with the wife ever since the separation of the husband and the wife on 21 December 2001, the respective tender age of the children, the several occasions of admitted beating of the children by the husband by using clothes hangers, and the inaction or failure on the husband's part in attending to the children after the separation, I am of the view that it is eminently unsuitable for guardianship to be given to the husband.

Learned counsel for the husband and for the wife respectively do not appear to have cited any authority in order to throw some light on the amended s. 5(1) and (2) of the Guardianship of Infants Act 1961. I believe there is no decided case in this respect.

In the circumstances, strictly on the above undisputed facts, I hold that guardianship should and is hereby given to the wife.

Custody, Care And Control

The common ground of the respective learned counsel on the issue under s. 88 is that this section applies to children even when there are no divorce proceedings as it is under Part VIII thereof which is separate from Part VI relating to divorce.

Section 88 expressly provides for the High Court to make an order for the custody of a child. So far as is relevant to the facts and circumstances of the case before me, s. 88(1) reads as follows:

> (1) The Court may at any time by order place a child in the custody of his or her father or his or her mother ...

It is trite law that in exercising custody jurisdiction, the court must "note that no parent enjoys an earlier or superior right over the child" (per Wan Yahya J (later FCJ) in *K. Shanta Kumari v. Vijayan* [1986] 2 MLJ 216 HC, at p. 218 B left) (See also *Teh Eng Kim v. Yew Peng Siong* [1977] 1 MLJ 234, HC at p. 236, left B, per Arulanandom J (as he then was) and at p. 239 H per Raja Azlan Shah FJ (now HRH Sultan of Perak).

In this respect, the factors which the court must consider have been set out in s. 88(2), which merits reproduction as follows:

> (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:
>
> (a) to the wishes of the parents of the child; and
>
> (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

A rebuttable presumption arises under s. 88(3) in favour of the mother in the following circumstances:

> (3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

Section 88(4), which makes it mandatory for the court to consider the welfare of each child independently, reads as follows:

> (4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

There is nothing in the undisputed facts to show that the wife is unable to provide the children with an adequate home environment. There was also nothing to militate against the wife in respect of her ability to shower love and affection on the children.

The English Court of Appeal case of *W. v. W. and C.* [1968] 2 All ER 408 has been cited for the husband, for the proposition that all things being equal, the children would be better with their father. However, the facts there were different from those before me. That case concerns a boy Andrew, eight years old, whose parents have separated. In the new household of Andrew's father, there were children of his own age, with whom he got on. He found company in his father's home, but in his mother's new home, there was only a tiny baby. The father's house was well looked after and tidy. On these facts, *inter*

alia, Lord Denning MR held that Andrew would be better with his father to whom custody was given.

On the undisputed facts before me, I am unable to conclude that the English Court of Appeal decision is supportive of the husband's contention.

In submitting that the *status quo* need not always be preserved, the husband relied on *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189. There, the husband a Malaysian citizen had applied for the custody of his two infant daughters aged 7 1/2 years and 8 1/2 years respectively, who were staying with his wife, an Indian citizen in India until 1978, but the husband returned to Malaysia in 1974. In 1980, the marriage broke down. The parties entered into a deed of separation of which custody of the infants was given to the husband. The wife returned to Bombay and subsequently filed a divorce petition inclusive of a prayer for the custody of the infants. The Bombay court made an interim custody order in favour of the wife. The husband then applied for the custody of the infants in the High Court Kuala Lumpur but failed as the learned judge was of the view that the husband was estopped from making the application in view of the decision of the Bombay court. On appeal, the Federal Court ordered that the proceedings be remitted for rehearing before another judge: [1981] 2 MLJ 326. After hearing, Ajaib Singh J (later SCJ) held that from all angles, it was in the best interest and welfare of the children that they live with their mother, thereby dismissing the husband's application and granting custody to the wife. The husband's appeal to the Federal Court was dismissed, since the welfare of the children must be the first and paramount consideration in such cases and other considerations must be subordinate. Raja Azlan Shah CJ (M)), (now HRH Sultan of Perak) in delivering judgment of the Federal Court held, *inter alia*, that it could not be but for the children's interest and welfare that they be returned to the mother.

Upon the above analysis of the judgment of Ajaib Singh J, as upheld by the Federal Court, I am of the view that the facts and the law there lean in favour of the wife and militate against the husband before me.

In *Re KO (an infant)* [1990] 1 MLJ 494, Edgar Joseph Jr. J (later FCJ) having regard to the welfare of the child as the paramount consideration granted custody of the child aged seven years three months to the mother. Again, the facts and the law in that case in relation to custody would also militate against the husband before me.

Since s. 88(2) expressly provides that the paramount consideration shall be the welfare of the child, it is necessary to explore what the word "welfare" means in this context.

It has been said that "welfare" is not to be equated with material advantage, but an inability to provide an adequate home environment is a determining factor: *Re F* [1969] 2 Ch. 238; *Re Story* [1916] 2 IR 328, 345, as quoted by S.M. Cretney in *Principles of Family Law*, 3rd edn. 1979.

The meaning of the word "welfare" has been comprehensively dealt with by Hashim Yeop A Sani J (later CJ(M) in *Loh Koh Fan v. Lee Moy Lan* [1976] 2 MLJ 88 when his Lordship followed the following passage in *The Queen v. Gnygall* [1893] 2 QB 232, 248:

> Again, the term 'welfare' in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the court in the exercise of this jurisdiction.

The learned judge added that it would be wrong to confine the meaning of "welfare" within the narrow confines of moral or material well being only of an infant or the wishes of the parents or of either of them, quoting *Re Satpal Singh, (An infant)* [1958] MLJ 283 and *Allen v. Allen* [1948] 2 All ER 413.

The facts in *Loh Koh Fah, supra,* showed that the parties were married in 1964 and lived with the husband's parents in Ipoh, after which they moved into their matrimonial home, also in Ipoh. In 1970, the parties agreed that the children and the wife move to Singapore to enable the children to receive their education there. In 1973, the husband wrote to the wife requesting her to return to Ipoh where the husband has built up his business but the wife refused. The husband's application for custody of the children was refused on the ground that the children should not be deprived of the love and devotion of their mother if the mother has been shown capable of giving them, as material advantages which the husband can give was no substitute for the care and devotion which the wife has shown to her children. Again, this case is neither useful nor helpful to the husband, but is actually in favour of the wife.

As the children before me are both below seven years of age, the rebuttable presumption under s. 88(3) is hereby invoked to the effect that it is good for them to be with their mother, who has always been with the children since the separation of the parties herein, and under s. 88(3), it is undesirable to disturb the life of the children by changes of custody.

In *K Shanta Kumari v. Vijayan, supra,* the wife applied to regain the custody of her 20-month-old infant from the husband who had taken the infant away without the wife's knowledge or consent. Wan Yahya J (later FCJ) applied the welfare of the children as the paramount consideration, having regard to the

care, comfort, attention, well being and happiness of the child, and held in favour of the mother being given custody of younger infants, quoting *Re Orr* [1973] 2 DLR 77.

The Federal Court in particular reference to the youngest (five year old) child of he parties in *Teh Eng Kim v. Yew Peng Siong, supra,* upheld the decision of Arulanandom J (as he then was) that the child's custody should be given to the wife. Raja Azlan Shah, FJ (now HRH Sultan of Perak) applied the dictum of Sir John Romilly MR in *Austin v. Austin* [1865] 35 Beav. 259, 263 that "Nothing, and no person, and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place." (See also *Kades v. Kades* [1961] 35 ALJR 251; *Re Orr, supra; J. v. C.* [1970] AC 668; 715; *B Ravandran s/o Balan v. Maliga d/o Mani Pillai* [1996] 2 MLJ 150 HC; *Thavamani Deve a/p Govindasamy v. N Sugumaran a/I Neelmehan & Anor* [1996] 4 MLJ 195 HC; *Chan Bee Yen v. Yap Chee Kong* [1989] 1 MLJ 370 HC; and *Helen Ho Quee Neo v. Lim Pui Heng* [1974] 2 MLJ 51 CA Singapore.

Apart from applying the above statutory provisions and the propositions of law enunciated in the above authorities, I have also exclusively interviewed the children pursuant to s. 88(2)(b) in order to ascertain their wishes. The elder child has been quite responsive to my questions relating to his own preference and is able to express an independent opinion. His answers have been consistently and decidedly in favour of staying with his mother, on the predominant ground of the beatings occasioned by the husband by using clothes hangers, resulting in injecting fear into him.

The younger child was not as sociable as his elder brother and has been crying continuously almost throughout the whole interview. However, it appears to me that he would find good company with his elder brother KH as they are similarly circumstanced.

On the facts and applying the law and decided cases as adumbrated above, it is my specific finding that custody, care and control of the two children should be given to the wife, which I do hereby order.

Liberal Access

Section 89(2)(d) of the Law Reform (Marriage and Divorce) Act 1976 provides that:

(2) Without prejudice to the generality of subsection (1), an order for custody may:

(a) ...;

(b) ...;

(c) ...;

(d) give a parent deprived of custody ... the right of access to the child at such times and with such frequency as the court may consider reasonable;

The wife does not appear to have any objection to the husband's application for liberal access.

In *Re H (Minors) (Access)* [1992] 1 FLR 148, the English Court of Appeal held that no court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interests of the child that access should cease, and that was a conclusion at which the court should be extremely slow to arrive at.

The English Court of Appeal added that where parents had separated, and one had the care of the child, access to the other often resulted in some upset to the child, but these upsets were usually minor and superficial and were heavily outweighed by the long-term advantage to the child of keeping in touch with the parent concerned, and that save in exceptional cases, to deprive a parent of access was to deprive a child of an important contribution to his emotional and material growing up in the long term (see also *Re M (Contact: Supervision)* [1998] 1 FLR 727 CA).

In *Re KO (an infant), supra,* Edgar Joseph Jr J (later FCJ) while giving custody, care and control of the child to the wife, ordered reasonable access, including staying access to the husband, substantially during the holidays.

In the circumstances, I make an order in terms of the liberal access as enumerated at the outset of this judgment, with a rider that the wife and members of her parents' family should give every facility, convenience and co-operation to the husband in making the liberal access a reality, as the husband is the father of the children and such liberal access would certainly enhance the emotional well being and happiness, most importantly, of the children and consequently the parties herein.

The interim consent order in respect of the maintenance of the children in the sum of RM900 per month is hereby confirmed.

The parties are to bear their own costs.